

No. 22,482

IN THE

**United States Court of Appeals
For the Ninth Circuit**

AGGREGATE ELECTRIC CO. (GUAM) INC.,
Appellant,

v.

GOVERNMENT OF GUAM,
Appellee.

On Appeal from the District Court of Guam

APPELLEE'S BRIEF

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FILED

JUL 19 1968

WILLIAM B. LUCK, CLERK

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APPELLEE'S BRIEF

JURISDICTIONAL STATEMENT

Jurisdiction of this action is vested in the District Court of Guam by Section 31 of the Organic Act of Guam, as amended. 72 Stat. 681 (1958), 48 U.S.C.A. Section 1421i(h) (i). This Court has jurisdiction of this appeal. 28 U.S.C. Sections 41, 1291 and 1294(4).

STATEMENT OF FACTS

The appellant herein, Accurate Electric Co. (Guam), Inc., is a corporation existing under the laws of Guam and at all times material to the issues herein it actively operated an electrical contracting

business in Guam. By common stock ownership, appellant was affiliated with Accurate Electric Co., a California corporation and with Land Sales of America, Limited, a Hong Kong corporation, which did business in California of "buying and selling". It was not shown that they were authorized to do business in Guam or that they did business in Guam. (T.R. 11.)

In 1958 Elmer L. Farris owned the entire outstanding shares in these three corporations except for the qualifying shares. (T.R. 4-7.)

In 1958 the California corporation entered into contracts with Empire Gas and Engineering Co. in Miami, Florida to perform certain electrical construction work in Guam for Empire, which was a general contractor having contracts with the Navy in Guam. (T.R. 5.)

Subsequently the California corporation subcontracted the labor portion of such contracts to the Guam corporation and subcontracted the materials portions to Accurate. (T.R. 5-6.) On March 5, 1958 a special meeting of the Board of Directors of Accurate was held. (Exhibit 2.) The only directors shown are Elmer L. Farris, who owned and controlled all but the qualifying shares of plaintiff corporation, the California corporation and Land Sales of America, Ltd. and Elaine Farris. (Plaintiff's Exhibit 2.) At such special meeting, the minutes show the various assignments referred to above. All these various assignments provided that the books would be kept by Accurate (California) and a service charge would be

paid to Accurate of California of \$5,000.00 per year for services.

No effective assignment of the authority to make purchases of materials was ever effectively assigned to Land Sales. Plaintiff concedes that "Land Sales was not doing business in Guam." (T.R. 43, line 15.) Apparently Land Sales was not qualified in Guam (T.R. 11) and did not operate there (T.R. 34, lines 14-18). There is no evidence that any assignment was even accepted by Land Sales; that any purchases were made by Land Sales; that Land Sales had ever invoiced or collected any charges for materials to any one under these contracts, or that Land Sales ever did any work in Guam. Whatever the original intention may have been, such intention was never implemented. (Defendant's Exhibits B, C, D and E.)

Plaintiff corporation performed not only the labor end of Empire's electrical work but also performed the materials portion thereof. (T.R. 34, 35 and 36.)

Plaintiff's books of account were maintained under the supervision of William Boyd, a qualified public accountant, who also made plaintiff's original returns (Defendant's Exhibits B, C, D and E) from such books. These returns included in plaintiff's income, the entire income (both labor and material portions) from the Empire Gas and Engineering Co. contracts. (T.R. 18, 19 and 22.) The books and records of plaintiff, of Accurate (California) and of Land Sales were all separately maintained from each other. (T.R. 22, lines 20-22.) They were all maintained under Boyd's supervision. (T.R. 22, lines 23-24.)

The "thought" of shifting the material portion of the Empire contracts from plaintiff's income to Land Sales income, was "brought up" when the "business privilege tax" was charged to plaintiff and later removed. (T.R. 8, 9 and 22.) This tax had been imposed with respect to the material or property portion of the Empire contract, but it was removed because "title to the property passed outside of Guam". (T.R. 37, lines 18-26.)

Plaintiff's books, reflecting the truth of the actual realization of this income, were not produced in court to prove this vital issue, notwithstanding the lower court's pointed criticism in the court's pretrial order, regarding plaintiff's failure to produce these books at pretrial. (See also T.R. 40, lines 7-13.)

Years after the original returns were filed, amended returns were filed, in which the material portions of the income from the Empire contracts were omitted from plaintiff's amended returns (T.R. 10, 11) and plaintiff filed claims for refund on such basis. In the deficiency notice (Exhibit 12) and in denying plaintiff's claims for refund, defendant restored to plaintiff's income the material portion of the Empire contracts and computed plaintiff's income on the basis of the percentage of completion of the Empire contracts. (T.R. 48, lines 17-24.)

The deficiency notice "was not based on the amended returns filed," (T.R. 48, lines 17-19 and T.R. 49, lines 11-18), but included both the material portion and the labor portion of the Empire contracts in

petitioner's income. (Petitioner's Exhibit 12, statement p. 1, paragraphs 2 and 3.)

ISSUES PRESENTED

1. District Court did not err in determining that the material portions of the Empire Engineering contracts in issue were actually performed by and realized by Accurate Electric Co. (Guam,) Inc.

2. District Court did not err in refusing to grant a new trial, when the court in its pretrial order had criticized plaintiff for not producing its books and records at the pretrial conference.

3. May the trial court make findings of fact from any evidence adduced at the trial which, in its judgment, has a bearing on the issues?

4. Is the defendant estopped to include in plaintiff's income, the material portion of the Empire contract income, when defendant removes the business privilege tax from such material?

5. Was plaintiff surprised or misled by any action by the District Court, or by defendant, into failing to produce its book of account and other records as evidence before the District Court?

6. Is it material to the issues herein, that defendant may not have contended before the District Court that the maintenance of plaintiff's books of account and records outside of Guam had any bearing on the taxable issues?

7. Does plaintiff's failure to produce in evidence its books of account and records, create an inference that, if produced, such books and records would have supported Commissioner's position that the entire Empire contract income was realized by plaintiff?

SUMMARY OF ARGUMENT

Defendant contends that plaintiff realized the material portions of income from its contracts with Empire Engineering, which plaintiff had reported in its original returns from its books of account and other records and the Commissioner of Revenue and Taxation had assessed a deficiency in Guam income taxes against plaintiff, including in income such material portions from the Empire Engineering contracts. The Commissioner's denial of plaintiff's claims for refund was also based upon the inclusion in plaintiff's income of such material portions thereof.

The burden of proof was upon plaintiff to show that it had not realized such material income and plaintiff failed to produce in court its books of account and other records, which would have proved who realized such income. No other evidence was produced to show that plaintiff did not realize such income, as originally interpreted by it from its books of account and as reported in its original returns.

Plaintiff failed to adduce sufficient evidence to overcome the presumption of correctness of the Com-

missioner's denial of plaintiff's claims and his determination of deficiencies.

ARGUMENT

Plaintiff's claims for refund were based primarily upon its contention that Land Sales of America, Inc. and not plaintiff corporation had realized the material portions of the income from the contracts with Empire Engineering. The determination of the deficiencies of \$9,855.42 also turns on the same issue.

This entire contract was performed on Guam and the evidence shows that plaintiff, Accurate Electric Company (Guam), Inc. performed all the material portions of such work on Guam. (T.R. 34, 35 and 36.) Accurate Electric Co. (Guam) was entitled to be compensated for this valuable performance and not the alleged assignee which did nothing.

There is no issue relative to the realization by plaintiff of the labor portion of the income.

While appellee's witness Hassell "admitted" that the materials portion of the Empire contract was taxable to "the corporation which realized it" (T.R. 36-37), plaintiff, in filing its original returns from its books of account, reported such material portions of the income, based upon its own interpretation of its books, the performance, the contracts and any assignments, that plaintiff had actually received and hence realized such material portions of the income for its own use and profit. Plaintiff failed to produce any

evidence to prove that Land Sales or any entity other than Accurate Electric Co. (Guam), Inc. had actually realized such material portions of the income from the Empire contract, or was entitled to receive any of such income for having performed the material portion of the contract.

Plaintiff's books of account and records were maintained since 1959 under the supervision of William Boyd, a qualified public accountant. (T.R. 18, 20.) He had been doing all of the accounting for Accurate Electric (Guam) all during that time. Boyd made up plaintiff's original income tax returns from its books for plaintiff for the fiscal years 1959, 1960, 1961, 1962, and 1963. (T.R. 19.) Presumably, plaintiff's books of account for these years correctly included both the material portions and the labor portions of plaintiff's income from the Empire Gas and Engineering Co. contract, as plaintiff's income, because, when Boyd made up the Guam income tax returns for plaintiff for those years from these books, he included such income as plaintiff's income in such returns.

The "thought" of filing amended returns for plaintiff, which shifted the material portion of the Empire contract income from plaintiff, was "brought up" when the gross receipts tax or business privilege tax was removed from the material under the contract (T.R. 22, lines 12-15), because title to such material passed outside of Guam (T.R. 37, lines 18-26).

This elimination of this entirely different tax from the material has no bearing or relevance whatsoever to the incidence of the income tax of plaintiff from

this material portion of the Empire contract income. It does not render plaintiff's Guam operation income from the contracts, taxable to Accurate (California) or to Land Sales, neither of which operated in Guam. The income remained plaintiff's Guam income and it is, therefore, Guam taxable income to plaintiff.

The alleged "mistake" of plaintiff of originally including its material portion of its Empire contract income in plaintiff's income, is not an acceptable reason for shifting plaintiff's income to another by filing erroneous amended returns, which excluded it. The removal of the gross receipts tax from the material does not require similar removal of plaintiff's income tax from the material sales. The incidence of the gross receipts tax has no bearing on the incidence of plaintiff's income tax on its Guam business operations. The business privilege tax was removed only because title passed outside of Guam. (T.R. 37, lines 18-26.)

By this action, the Commissioner is not estopped, for income tax purposes, to tax the material portion of the Empire Contracts income to plaintiff. None of the elements of estoppel is present. None was argued by plaintiff in its brief.

The Commissioner's restoration of this material portion of the Empire contract income to plaintiff is fully justified by the record. It was not a "mistake" to so include such income originally. The Commissioner's assessments, which are in issue here, were based upon the premise that all such income was realized by plaintiff, including the material portions of the contract with Empire. No evidence contradicting

the realization of this income by plaintiff, Accurate Electric Co. (Guam), Inc. was produced. The correctness of the Commissioner's actions contested herein could have been confirmed or refuted by the production by plaintiff of its books of account and other records, but plaintiff significantly chose not to produce them.

Plaintiff failed to prove that it was surprised or misled by any action of the District Court or of defendant into failing to produce its books and records as evidence before the District Court.

Plaintiff's failure to produce such books and records creates a strong inference that the books and records would have supported the Commissioner's position had they been made available to the District Court as evidence.

“. . . The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. *Clifton v. United States*, 4 How. 242, 247, 11 L.Ed. 957. Silence then becomes evidence of the most convincing character . . .” citing cases. *Interstate Circuit v. United States* 306 U. S. 208, 226, 59 S.Ct. 467, 474. (1939).

Plaintiff was charged with the necessity of producing such books and records by the District Court in his Pretrial Order of June 18, 1967 in which he said in part:

“There was very little discussion at the pretrial conference because the plaintiff's books were not available locally, but the plaintiff contended that

its business practices were interwoven with those of a California corporation and certain sub-contracts.”

Under these circumstances, certainly plaintiff is in no position to claim “surprise” or being “misled into not producing all of the original books and records pertaining to the litigation”. Plaintiff was actually warned, so to speak, by the District Court to produce the records, by the court’s pretrial order.

The vital necessity for having the books in court is indicated by the witness Hassell. (T.R. 40, lines 7-13.)

Plaintiff had the burden of proof and it cannot shift to the District Court or to the defendant, the responsibility for its own failure to produce the books and records in court, as required by its burden of proof.

The Court of Appeals for the Ninth Circuit has “consistently held that determination by the Commissioner raises a presumption of correctness which disappears, once evidence which would support a contrary finding has been adduced in the trial of a contested issue . . .”

Niederkrone v. Commissioner 266 F.2d 238, 241 (C.A. 9, 1959) certiorari denied, *sub nom. Royce v. Com.* 359 U.S. 945, 79 S.Ct. 725 (1959); *Welch v. Helvering* 290 U.S. 111, 115, 54 S.Ct. 8, 9 (1933).

No evidence which would support a finding contrary to the realization of the material portion of the income from the Empire contract by plaintiff, was

adduced by the plaintiff. The judgment of the District Court must, therefore, be affirmed.

“A motion for a new trial is addressed to the sound discretion of the trial court and an order on such a motion is generally not reviewable except when the trial judge acts under a mistake of law, lacks power to grant the motion, fails to exercise his discretion or abuses his discretion.” *Pool v. Leone* 374 F.2d 961, 963, 964, (C.A. 10, 1967) cert. den. 389 U.S. 943.

None of these circumstances is applicable to the situation here. The motion for new trial was properly denied.

Plaintiff argues (pages 11 and 12) that Section 7422 (e) (Internal Revenue Code 1954) prevents the District Court from making its decision final as to the deficiency of \$9,855.42.

The suit on the taxpayer's claims for refund was filed on April 10, 1967. Prior to that date, the period (150 days) within which plaintiff could have petitioned, but did not petition Tax Court, plus 60 days thereafter, had expired and the deficiency then became collectible by defendant. The issues in the claims for refund and in the deficiency notice both involved the inclusion of the material portion of plaintiff's income from the Empire Gas and Engineering contracts. The court's decision on the claims for refund is res judicata as to the deficiency determined by defendant in the matter of the inclusion of this income in plaintiff's income for the years involved. The court's decision is, therefore, final on this inclusion

both as to the claims for refund and as to the deficiency determined on April 10, 1967 and obviously the provisions of Section 7422 (e) of the Internal Revenue Code are wholly without application here, as was improperly argued by plaintiff on pages 11 and 12 of its brief.

It is wholly immaterial that defendant may not have contended that the maintenance of plaintiff's books and records outside of Guam had any bearing on the taxable issues involved in this action.

**EVIDENCE SUPPORTING CHALLENGED FINDINGS
SPECIFIED BY PLAINTIFF AS ERROR**

Plaintiff, in its brief, specified as error the following findings of the trial court:

1. The District Court's finding that there was no effective assignment of the material portion of the Empire subcontract to Land Sales by Accurate Electric Co. (Guam).
2. The District Court's finding that Accurate Electric Co. (Guam) purchased any materials for its own account.
3. The District Court's finding that Accurate Electric (California) made an effective assignment of the material portion of the Empire subcontract to Accurate Electric Co. (Guam).

Except for the qualifying shares, Elmer L. Farris owned and controlled all the outstanding shares of Accurate Electric Co. (Guam), Accurate Electric Co.

(California) and Land Sales of America Ltd. (a Hong Kong Corporation) and was an officer and director of each such corporation. (T.R. 4, 5, 6, Pl. Exhibit 2.) Of these three corporations, only Accurate Electric Co. (Guam) was authorized to operate in Guam. It was the only corporation of the three which actually was shown to have operated in Guam. (T.R. 7, 11, 34, 35 and 36.)

Accurate Electric Co. (Guam) actually performed in Guam all of the material portion of the Empire contracts. (T.R. 34, 35 and 36.) Plaintiff conceded that "Land Sales was not doing business in Guam". (T.R. 43, line 15.)

The Empire contracts income was run through the books of Accurate Electric Co. (Guam) as indicated by the original returns made from those books by a qualified public accountant, who supervised the keeping of such books, and reported such income as the income of Accurate Electric Co. (Guam). (T.R. 18, 19, 20, 22, 23, 24, Defendant's Exhibits B, C, D and E.)

The "thought" of shifting the material portion of the Empire contracts, was "brought up" when the business privilege tax was charged to plaintiff and later removed (T.R. 8, 9 and 22), because "title to the property passed outside of Guam" (T.R. 37, lines 18-26).

These facts are wholly inconsistent with any effective assignment to Land Sales of America Ltd. (Hong Kong). These facts are consistent *only* with the

assignment of the materials portion of the Empire contract to Accurate Electric Co. (Guam). It must be assumed that, no matter how informal the means, Elmer L. Farris employed his control of this group of corporations to effectively assign the material portion of the Empire contracts to Accurate Electric Co. (Guam).

No books or records to the contrary were produced at the trial by plaintiff.

There is no evidence in the record that any assignment was actually accepted by Land Sales; that any material purchases were made by Land Sales; that Land Sales ever had invoiced or collected any charges for materials to Guam to any one of these contracts or, that Land Sales ever did any work or delivered any material to Guam under the Empire contracts.

The three foregoing questioned findings of the District Court were fully justified on the basis of the record because there is some competent evidence to support such findings. *Smith v. Howard* 322 P.2d 1034, 1037, *Weltman v. Kaye* 334 P.2d 917, 920. If there is any evidence consistent with the trial court's finding, such finding must stand. *Fritz v. Thompson* 271 P.2d 205, 209, *Noble v. Learned* 153 Cal. 245, 94 P. 1047, 1050.

CONCLUSION

The lower court therefore did not err in taxing the material portion of the Empire Gas Co. contracts for the years in issue to the plaintiff-appellant, and the judgment of \$9,855.42 should be affirmed.

Dated, Agana, Guam,
July 17, 1968.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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